

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOREN A. JOHNSON)	
Claimant)	
VS.)	
)	Docket No. 211,043 & 220,243
SIDING SUPPLY, INC.)	
STONEPOINT CONSTRUCTION)	
Respondents)	
AND)	
)	
INDIANA LUMBERMEN'S MUTUAL)	
NORTHWESTERN NATIONAL CASUALTY)	
Insurance Carriers)	

ORDER

Respondent, Siding Supply, Inc., and its insurance carrier, Indiana Lumbermen's Mutual, requested Appeals Board review of Administrative Law Judge Nelsonna Potts Barnes' preliminary hearing Order dated January 19, 1999.

RECORD

The Administrative Law Judge listed the record in her preliminary hearing Order as the deposition testimony of Dr. Tyrone Artz taken on February 6, 1997, the preliminary hearing transcript dated April 29, 1997, the preliminary hearing transcript dated September 24, 1998, and the deposition testimony of Dr. Peter V. Bieri taken on October 27, 1998.

ISSUES

Claimant originally filed an Application for Hearing on March 25, 1996, alleging a date of accident of September 1994 and each and every day thereafter for a left shoulder injury. Claimant alleged the injury occurred while he was working for Siding Supply, Inc., (Siding Supply). This application was assigned Docket No. 211,043.

The first preliminary hearing was held on October 31, 1996, at the request of the claimant. In a preliminary hearing Order dated the same day, orthopedic surgeon

Tyrone D. Artz, M.D., was appointed as claimant's treating physician for the left shoulder injury. Dr. Artz had referred claimant to Chris Miller, M.D., one of his associates, and the Administrative Law Judge also authorized Dr. Miller as one of claimant authorized treating physicians.

Dr. Miller had claimant undergo EMG and nerve conduction studies that showed claimant with bilateral carpal tunnel syndrome and bilateral ulnar neuropathy. When conservative medical treatment failed to improve claimant's conditions, Dr. Artz performed an anterior transposition of the ulnar nerve at the left elbow and an open release of the left carpal tunnel median nerve.

On January 13, 1997, the respondent, Siding Supply, filed a motion to terminate medical treatment and temporary total disability benefits for claimant's left carpal tunnel syndrome and left ulnar nerve injuries. Siding Supply alleged those conditions were not related to the September 1994 accident that occurred while he was working for Siding Supply.

In the preliminary hearing Order dated January 24, 1997, the Administrative Law Judge suspended the medical treatment and temporary total disability benefits related to those two conditions until the Administrative Law Judge received causation opinions from the authorized treating physicians. But benefits were continued for claimant's left shoulder and cervical problems.

Dr. Artz' deposition was taken by the parties on February 6, 1997. On February 10, 1997, claimant filed an Application for Hearing alleging a date of accident of September 1995 and each and every working day thereafter while claimant was employed by Stoneypoint Construction (Stoneypoint). Claimant alleged bilateral carpal tunnel syndrome, shoulder, and neck injuries. Docket No. 220,243 was assigned to this application.

At the claimant's request, another preliminary hearing was held on April 29, 1997. Claimant requested medical treatment for the left carpal tunnel syndrome and ulnar nerve surgery along with temporary total disability benefits. Both respondents, Siding Supply and Stoneypoint, were involved in that preliminary hearing. As a result of that preliminary hearing, the Administrative Law Judge entered an Order dated April 28, 1998, almost one year later, that appointed Peter V. Bieri, M.D., to conduct an independent medical examination of claimant. The purpose of the independent medical examination was to determine whether claimant's left carpal tunnel syndrome and ulnar nerve conditions were related to the September 1994 accident while claimant was working for Siding Supply or the result of a later aggravation or a new injury.

Dr. Bieri examined claimant on June 19, 1998, and issued his findings in a report dated July 9, 1998. After the September 24, 1998, preliminary hearing, that is the subject of this appeal, Dr. Bieri's deposition was taken on October 27, 1998.

Thereafter, on January 19, 1999, the Administrative Law Judge issued this preliminary hearing Order that found claimant's left carpal tunnel syndrome and left ulnar nerve injuries were related to the September 1994 work accident at Siding Supply. All medical treatment, including the surgery, was ordered paid by Siding Supply along with any ongoing medical treatment for those injuries. The Administrative Law Judge also found claimant was entitled to temporary total disability benefits, if taken off work by the authorized physician. Additionally, the Administrative Law Judge found Stoneypoint had no responsibility for any workers compensation benefits because claimant had failed to provide Stoneypoint with timely notice of a work related accident.

Siding Supply has appealed and contends claimant's left carpal tunnel syndrome and left ulnar nerve injuries did not occur while working for Siding Supply. Siding Supply contends those conditions are directly related to the repetitive work activities claimant performed while he was employed by Stoneypoint and have no relationship to the September 1994 accident.

FINDINGS OF FACT

The Appeals Board has reviewed the preliminary hearing record and the arguments contained in the briefs of the parties. For the reasons more fully set forth below, the Appeals Board concludes that the January 19, 1999, preliminary hearing Order finding Siding Supply responsible for medical treatment and temporary total disability benefits associated with claimant's left carpal tunnel syndrome and left ulnar nerve injuries should be modified. The Appeals Board concludes, it is more probably true than not that those injuries occurred while claimant was employed by Stoneypoint and not by Siding Supply.

- (1) Claimant injured his left shoulder in September 1994 unloading siding while employed by Siding Supply.
- (2) Claimant worked for Siding Supply as a warehouseman, only for a short period of time, from September 1994 until December 17, 1994. He was terminated on that date for reasons not fully explained in the record.
- (3) Claimant was unemployed for a period of time and then worked for seven weeks for Custom Cupboards.
- (4) In September 1995, claimant went to work for Stoneypoint working nine hours per day putting siding on the exterior of buildings. This work required claimant to work repetitively with both hands.
- (5) Claimant quit Stoneypoint on November 11, 1996, to go to work as a carpenter for Phil Harden Construction Company.

(6) Claimant's left shoulder remained symptomatic, and he saw orthopedic surgeon Tyrone D. Artz, M.D., for the left shoulder injury on June 24, 1996.

(7) Dr. Artz examined claimant and diagnosed claimant with a posterior subluxation and probable injury to the posterior capsule and glenoid labrum of the left shoulder. During the physical examination, claimant related intermittent episodes of vague numbness in his left shoulder and upper arm to the wrist but no numbness or tingling in the left hand. The doctor found a negative Tinel's sign over the median nerve at the wrist and over the ulnar nerve at the elbow.

(8) Claimant saw Chris Miller, M.D., at the request of Dr. Artz, for a follow up examination on November 11, 1996. At that time, claimant not only had pain in his left shoulder but had numbness and tingling extending down his left arm to his index finger. Dr. Miller's impression was anterior instability of the left shoulder probably from a minor tear or subluxation episode. He had claimant undergo EMG and nerve conduction studies to rule out nerve compression syndrome.

(9) The EMG and nerve conductive studies revealed bilateral moderate carpal tunnel syndrome and associated ulnar neuropathy, left greater than the right. An MRI examination also showed cervical spondylotic changes and a herniated disc on the left side at C5-C6.

(10) On December 31, 1996, claimant was referred back to Dr. Artz for treatment of his carpal tunnel syndrome and ulnar neuropathy. At that time, Dr. Artz found a positive Tinel's sign over the median nerve at the left wrist and over the ulnar nerve at the left elbow. No numbness was found on the right.

(11) Because claimant had not improved with conservative treatment, on January 7, 1997, Dr. Artz performed an open release of the left carpal tunnel and an anterior transposition of the left ulnar nerve at the elbow. Claimant was released on February 20, 1997, with permanent function impairment of 20% of the left upper extremity and without permanent restrictions.

(12) Dr. Artz testified that the carpal tunnel syndrome was a progressive disease usually related to activities such as grasping, twisting, turning, pushing, or pulling with the wrist and hand over a period of time. When claimant was examined on June 24, 1996, he did not have complaints of numbness in his left hand and the Tinel test on the left was negative. Dr. Artz expressed his opinion within a reasonable degree of medical probability that claimant's employment as a carpenter between June 1996 and December 1996 caused a progression of the carpal tunnel condition. Dr. Artz also opined that he would not have performed surgery on claimant in June 1996 based on the history claimant gave at that time.

(13) Claimant testified as he continued to work for Stoneypoint as a sider he developed more numbness down his elbow into his hand. He performed the repetitive siding duties for Stoneypoint for over a year from September 1995 through November 11, 1996. Claimant testified he then quit voluntarily and went to work as a carpenter for Phil Harden Construction Company because it paid more money.

(14) Claimant testified that he thought the numbness in his left hand was related to his left shoulder injury until the deposition of Dr. Artz was taken on February 6, 1997. Consequently, claimant testified he did not notify Stoneypoint that he was claiming his left carpal tunnel syndrome was related to his work activities at Stoneypoint until his attorney sent a letter on February 7, 1997.

(15) Although claimant was not diagnosed with carpal tunnel syndrome until over two years after he injured his left shoulder while working for Siding Supply, Dr. Bieri attributed claimant's carpal tunnel syndrome condition to the September 1994 accident at Siding Supply.

(16) Dr. Bieri admitted that claimant's carpal tunnel syndrome worsened while he worked for Stoneypoint, but he would not express an opinion within reasonable probability that the worsening caused a true aggravation. Because claimant did not give Dr. Bieri a history of an additional injury or any activity that the claimant thought had caused his carpal tunnel syndrome condition, Dr. Bieri attributed the condition to the accident at Siding Supply.

CONCLUSIONS OF LAW

(1) The claimant has the burden to establish his or her right to an award of compensation and to prove the various conditions on which the right depends. See K.S.A. 44-501(a).

(2) When a workers job duties aggravate or accelerate a preexisting condition or disease, the aggravation becomes compensable as a work-related accident. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

(3) The Appeals Board concludes that the most persuasive medical evidence contained in the preliminary hearing record is the testimony of claimant's treating physician, Dr. Artz. When Dr. Artz testimony is coupled with the testimony of the claimant, the Appeals Board concludes claimant's left carpal tunnel syndrome and left ulnar nerve injuries were either caused or permanently aggravated by his work activities while he was employed by the respondent Stoneypoint and not the respondent Siding Supply.

(4) Claimant is required to give the employer notice of a work-related accident within 10 days thereof or show just cause within 75 days why notice was not given within the required 10 days. See K.S.A. 44-520.

(5) In this case, claimant admitted his last day of work for Stoneypoint was November 11, 1996. He did not notify Stoneypoint until February 7, 1997, that he was claiming his work activities had caused his carpal tunnel syndrome and ulnar nerve conditions. This period exceeds the 75 days the statute allows claimant to show just cause for failure to give the employer notice of accident within 10 days. Thus, claimant's claim for workers compensation benefits against the respondent Stoneypoint is denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant's request for preliminary hearing benefits for medical treatment and temporary total disability payments for left carpal tunnel syndrome and ulnar nerve injuries is denied. At this stage in the proceeding, claimant has failed to prove he provided respondent Stoneypoint with timely notice of accident as required by K.S.A. 44-520.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Richard J. Liby, Wichita, KS
Ronald J. Laskowski, Topeka, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director